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No. 91-1636

In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANK RENFROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KRISTINA L. AMENT
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

(3)

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying petitioner's motion for a severance on the grounds of disparity of evidence and antagonistic defenses.

2. Whether the district court abused its discretion by allowing a DEA agent to testify as an expert witness.

3. Whether remarks by the prosecutor during trial constituted plain error and deprived petitioner of a fair trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is unreported, but the judgment is noted at 951 F.2d 350 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1991. The petition for a writ of certiorari was filed on March 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted, together with Odolph Daniels and Wendell Daniels, on charges of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Wendell Daniels was also convicted of distribution of cocaine. Petitioner was sentenced to 294 months' imprisonment, to be followed by a five-year term of supervised release. The court of appeals affirmed. Pet. App. A1-A17.

1. On December 1, 1989, Wendell Daniels sold an FBI informant one-half kilogram of cocaine for $13,500 at Daniels' home in Detroit, Michigan. After the transaction, the informant introduced FBI agent Frederick Snellings to Daniels as his friend "Teddy." On December 15, 1989, Snellings told Daniels that he would deliver the balance of the money owed on the December 1 sale and that he would like to purchase more cocaine, this time without the informant's participation. After further negotiations, Snellings agreed to purchase four kilograms of cocaine. Pet. App. A3-A4.

On December 18, Snellings and another agent met Wendell Daniels and petitioner near Daniels' home. The agents then followed Daniels and petitioner to Daniels' residence. There, petitioner called Wendell Daniels' brother Odolph Daniels and told him to have Jason Young deliver four kilograms of cocaine. Petitioner also directed Wendell Daniels to count the $100,000 that the agents had brought. After Odolph Daniels called Young, the two brought the cocaine to Wendell Daniels' home. The agents then arrested petitioner, Young, Wendell Daniels, and Odolph Daniels; they found another

kilogram of cocaine inside a briefcase in Young's car. Pet. App. A4-A6.

2. Prior to trial, petitioner and Odolph Daniels moved for severance of their trial from that of Wendell Daniels. They claimed that the overwhelming evidence against Wendell Daniels would spill over and impermissibly prejudice them. They also argued that their defenses were antagonistic to that of Wendell Daniels. The district court denied the motions, finding that Daniels and petitioner had not shown any risk of compelling prejudice from the joint trial. Gov't C.A. Br. 5.

At trial, each of the three defendants testified. Wendell Daniels claimed entrapment, while Odolph Daniels and petitioner claimed that they were unaware that a drug transaction was taking place.

3. On appeal, petitioner argued that the possibility of spillover and conflicting defenses required a severance. The court of appeals held that the district court did not abuse its discretion in denying the severance. It stated that "[a] great disparity of evidence alone will not serve as a basis of severance." Pet. App. A8. To mandate severance due to evidentiary disparity, the court explained, a defendant "must show an inability by the jury to separate and to treat distinctively evidence that is relevant to each particular defendant on trial." *Ibid.* The court further observed that "[t]he jury must be presumed capable of sorting out the evidence and considering the case of each defendant separately." Pet. App. A9.

The court of appeals held that petitioner and Odolph Daniels had failed to overcome that presumption. It acknowledged the greater amount of evidence against Wendell Daniels, but it held that under the circumstances of this case, petitioner and Odolph Daniels were not subjected to unfair prejudice as a result of the disparity. The court noted that the case was a simple one, involving only three defendants and only two cocaine transactions.

It was therefore unlikely that the jury would be "unable to separate the evidence with respect to each defendant." Pet. App. A10. In addition, the court noted that, under the rule of *United States* v. *Swift*, 809 F.2d 320, 323 (6th Cir. 1987), the defendants' failure to renew the severance motions at the close of the evidence resulted in a waiver of those motions.

The court of appeals also rejected the claim that the district court had abused its discretion by admitting Snellings' expert testimony, and it rejected petitioner's claims of prosecutorial misconduct. Pet. App. A11-A12.

ARGUMENT

1. Petitioner renews his contention (Pet. 7-12) that the district court abused its discretion by trying him together with Wendell Daniels. Petitioner argues that he was entitled to a severance on two grounds: the disparity in the strength of the evidence against himself and against Wendell Daniels; and the antagonism between his defense and that of Wendell Daniels.[1]

It is well settled that persons who are indicted together generally should be tried together. See, *e.g.*, *United States* v. *Warner*, 955 F.2d 441 (6th Cir. 1992); *United States* v. *Tootick*, 952 F.2d 1078 (9th Cir. 1991); *United States* v. *Romanello*, 726 F.2d 173, 177 (5th Cir. 1984). Rule 14, Fed. R. Crim. P., however, authorizes district courts to sever the trial if a joint trial will prejudice the defendant. The courts of appeals review determinations concerning severance for an abuse of

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[1] Petitioner argues that the Sixth Circuit's rule, which requires severance motions to be renewed at the close of the evidence, conflicts with the rule in other circuits. That issue is not appropriate for review, because waiver served as only an alternative ground for the court's decision. Before addressing the waiver issue, the court of appeals found that petitioner had failed to show that he would be prejudiced by a joint trial.

discretion. See, *e.g.*, *Romanello*, 726 F.2d at 177; *United States* v. *Davis*, 623 F.2d 188, 194 (1st Cir. 1980).

The disparity in the amount of evidence against petitioner and Wendell Daniels did not require that petitioner be granted a severance. Differences in the amount of evidence against different defendants do not require a severance unless there is a risk of prejudice from the spillover of evidence from one defendant to another. See, *e.g.*, *United States* v. *Kindle*, 925 F.2d 272, 277 (8th Cir. 1991); *United States* v. *Hernandez*, 921 F.2d 1569 (11th Cir.), cert. denied, 111 S. Ct. 2271 (1991). If the jury can compartmentalize the evidence respecting the various co-defendants, evidentiary disparity does not require a severance. Here, the facts of the case were not complicated, and only three defendants were on trial. Because there was no reason the jury could not weigh the evidence against each defendant separately, the district court did not abuse its discretion by denying a severance.

As to petitioner's argument that the antagonism between his defense and that of Wendell Daniels required a severance, this Court has granted certiorari in *Zafiro* v. *United States*, No. 91-6824, which raises the question whether the presentation of antagonistic defenses entitles criminal defendants to separate trials. The Seventh Circuit in *Zafiro* affirmed the denial of a severance to two pairs of defendants who asserted antagonistic defenses. The court noted that many cases have stated that a defendant is entitled to a severance when the defendants present antagonistic defenses such that the acceptance of one party's defense would lead the jury to conclude that the other party is guilty. *United States* v. *Zafiro*, 945 F.2d 881, 885 (7th Cir. 1991). The court refused to adopt that standard. It explained that "[t]he fact that it is certain that a crime was committed by one of two defendants is a reason for trying them together, rather than a reason against, to avoid 'the scandal and

inequity of inconsistent verdicts.'" *Ibid.* (quoting *Richardson* v. *Marsh*, 481 U.S. 200, 210 (1987)). The court concluded that "persons charged in connection with the same crime should be tried separately only if there is a serious risk that a joint trial would prevent the jury from making a reliable judgment about the guilt or innocence of one or more of the defendants." 945 F.2d at 885.[2] That issue, the court reasoned, should rarely be determined by reference to the existence of antagonistic defenses; rather "[i]f it is indeed certain that one and only one of a group of defendants is guilty, the entire group should be tried together, since in separate trials all might be acquitted or all convicted—and in either case there would be a miscarriage of justice." 945 F.2d at 886.

In this case, the court of appeals did not directly address the question whether antagonistic defenses require a severance. It discussed instead the ability of the jury independently to decide the guilt of each defendant. Moreover, Daniels' defense of entrapment was not necessarily inconsistent with petitioner's defense of lack of knowledge. The jury could have believed that Wendell Daniels was entrapped and that petitioner was an unwitting participant in the resulting drug transaction. Thus, even if this Court concludes in *Zafiro* that defendants who present antagonistic defenses are entitled to a severance, the result in this case would not necessarily be

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[2] The court offered two examples of such a case. First, in "a *complex* case with *many* defendants some of whom might be only *peripherally* involved in the alleged wrongdoing," severance may be required because "the bit players may not be able to differentiate themselves in the jurors' minds from the stars." 945 F.2d at 885. Second, severance may be warranted "where exculpatory evidence essential to a defendant's case will be unavailable—or highly prejudicial evidence unavoidable—if he is tried with another defendant." 945 F.2d at 886.

affected. Nonetheless, because both this case and *Zafiro* involve the extent to which antagonistic defenses require a severance under Rule 14, it is possible that the Court's decision in *Zafiro* may affect the disposition of this case. The Court therefore may wish to hold this petition pending its decision in *Zafiro*.

2. Petitioner contends (Pet. 12-17) that the district court abused its discretion by permitting FBI agent Snellings to testify as an expert with regard to drug-related expressions in the tape-recorded conversations that were played for the jury. Agent Snellings, who had conducted 50 to 100 undercover narcotics investigations and had attended FBI training school to study types of drugs, street language of the drug trade, and undercover narcotics work, testified in part as an expert pursuant to Fed. R. Evid. 702 and was permitted to decipher the drug-related language in the recorded conversations.[3] The recorded conversations contained a great deal of street language and coded drug terms, such as "yellow stuff," which Snellings said referred to heavily cut cocaine, and "knock[ing] a nickel off," which Snellings interpreted to mean reducing the price by $5,000. Petitioner did not object to the admission of any of Agent Snellings' expert testimony. Gov't C.A. Br. 15-17. The district court also gave defense counsel wide latitude in cross-examining Snellings and instructed the jury that it was free to accept or reject his testimony.

Expert testimony about the meaning of street language and coded expressions in drug cases is often

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[3] Rule 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

helpful to a jury. "Lay jurors cannot be expected to be familiar with the lexicon of the cocaine community." *United States* v. *Hoffman*, 832 F.2d 1299, 1310 (1st Cir. 1987); accord *United States* v. *Brown*, 776 F.2d 397 (2d Cir. 1985), cert. denied, 475 U.S. 1141 (1986). Nor was it improper, as petitioner contends (Pet 12-13), for the district court to permit Snellings to testify that the defendants appeared to understand particular conversations. Snellings observed the demeanor of those to whom he spoke and could testify as a fact witness about it. There was nothing improper in permitting Snellings to give both fact evidence and expert testimony. See *Brown*, 776 F.2d at 400. Petitioner's contention that the length of Snellings' testimony—over 200 transcript pages—rendered it inadmissible is plainly without merit.

3. Petitioner further contends (Pet. 17-22) that alleged instances of misconduct in the prosecutor's opening statement and closing arguments require reversal of his conviction. The court below properly found no plain error in any of the challenged remarks.

We submit that each of the prosecutor's comments about which petitioner now complains was proper. Even if the comments were improper, however, they certainly did not constitute plain error, which petitioner concedes is the applicable standard, see Pet. 22.

First, the prosecutor's reference to religion in his opening statement (I Tr. 4-5) was merely a factual statement to the jury, warning the jurors to expect curse words on the tape recordings to be introduced at trial. The prosecutor tempered the comments by reminding the jurors not to take offense at the language. Second, the comment in closing argument concerning the policy of maintaining the confidentiality of informants (III Tr. 108) simply explained the reason for the policy generally. The prosecutor never suggested that the defendants on trial might harm the informant. Rather, he

remarked that the government was attempting to maintain the trust of all informants by strictly maintaining confidentiality. Third, the comment in rebuttal argument on defense tactics (IX Tr. 150-151) was a permissible discussion of the focus of petitioner's argument, which was an entirely appropriate introduction to the prosecutor's effort to rebut that argument. Thus, the comments at issue were not erroneous at all, much less plain error resulting in a miscarriage of justice.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending the disposition of *United States* v. *Zafiro*, No. 91-6824. In all other respects, the petition should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KRISTINA L. AMENT
Attorney

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